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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 4541

BOROUGH OF FORD CITY, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BOROUGH OF FORD CITY, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counsel, on behalf of the Borough of Ford City, prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania entered January 29, 1963, is reported at 213 F. Supp. 248 (W.D. Pa. 1963). The Opinion of the United States Court of Appeals for the Third Circuit entered April 28, 1965 is reported at 345 F.2d 645 (CA 3, 1965).

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered April 28, 1965. The jurisdiction of the Court is invoked pursuant to 28 U.S. Code 1254 (1).

QUESTIONS PRESENTED

1. Whether a sewage collection system, the property of the Petitioner, for use in its municipal government, is non-riparian property beyond the bed of a navigable stream which was destroyed by action of the United States Government in permanently raising the elevation of the navigable stream and thereby raising the ground water table so as to permanently inundate the sewage collection system is a taking under the Fifth Amendment of the United States Constitution which must be compensated for.

2. Whether the Circuit Court was in error when it ruled that, in determining post-dam ordinary high water mark by a vegetation test, the vegetation line must be an agricultural line.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

". . . nor shall private property be taken for public use without just compensation . . ."

The following statute is set forth: Public Law 86-538 approved June 29, 1960, 74 Stat. 252 which reads as follows:

"AN ACT

"For the relief of the Borough of Ford City Pennsylvania

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding laches or any statute of limitations, jurisdiction is hereby conferred on the United States District Court for the Western District of Pennsylvania, to hear, determine, and render judgment on the claim of the borough of Ford City, Pennsylvania, for damage to its sewer system allegedly due to the construction by the Department of the Army of a lock and dam designated as lock and dam numbered 6, on the Allegheny River.

"SEC. 2. Proceedings shall be instituted any time within 90 days after the date of the enactment of this Act.

"Approved June 29, 1960."

Statement

The petitioner, a municipal corporation, is a political subdivision of the Commonwealth of Pennsylvania located in Armstrong County with its western limits bounded on the Allegheny River. The petitioner has no title to land within its corporate limits bordering on the Allegheny River; none of its sewage collection system, exclusive of outfalls, is located on land bordering the Allegheny River.

In 1898, the Petitioner constructed its city sewage system in accordance with good engineering practice and in reliance on the natural level, temporary high waters, width and flow of the Allegheny River and the ground water table level in this area. Further additions to this system were made in 1922. These sewers had elevations ranging from 767.88 (USGS datum) above sea level to 791.52 (USGS datum) above sea level. Approximately one-third of this sewage system has an elevation under 773.58 (USGS datum).

In the year 1928, the United States Government completed the construction of Lock & Dam No. 6 at a point on the Allegheny River approximately five miles below Ford City and has since operated this dam as a part of the system of river improvements. The normal pool created by the dam permanently raised the level of the Allegheny River to a stage of approximately 770 feet (USGS datum) above set level which is above pre-dam ordinary high water mark.

Prior to the construction of the dam the sewers operated most satisfactorily with few, if any, minor maintenance problems. The several pumps that were in-

stalled were utilized on rare occasions and then only at time of flood waters and spring freshets. Some years they were not used at all.

As a result of the construction of the dam, the Allegheny River was increased from an elevation of approximately 760.7 feet above sea level at Ford City (average stage between 1905 and 1927 for 71% of the time), to an elevation of approximately 770.4 feet above sea level (average stage from 1940 to 1960 for 75% of the time). These averages do *not* exclude periods of flood and spring freshets. Where the average flow of the open river for the same periods occupied approximately 20% of the time, the elevation at Allegheny River increased from 766 feet above sea level at Ford City prior to the building of the dam to approximately 774 feet above sea level subsequent to the dam.

The rise and fall of the river, together with the fact that the dam created a normal pool level of approximately 770 feet above sea level, permanently raised the ground water table through the percolation of the river water into the sand and gravel stratum upon which Ford City is located to an elevation which *inundated approximately one-third of the Ford City sewers* thereby permanently damaging said sewers and rendering them unfit for collection of sanitary waste.

This under-surface invasion of the land surrounding the petitioner's sewers made necessary the installation of additional pumps in order to take care of the river and ground water seeping into the sewers and to prevent the flooding of residential basements to no avail. Prior to Lock & Dam No. 6, residential basements seldom, if at all, had back-up of seepage, but had perma-

nent flooding after building of dam. Such seepage took along with it the fine sands surrounding the sewers which in turn softened the foundations of the sewers, clogged the sewers, and caused breaks in the surface above the sewers. As a result, the sewers which exist at elevations above 773.58 feet were not affected by the building of Lock & Dam No. 6 and remain in excellent condition suitable for use in connection with sanitary sewage.

The elevation of the Allegheny River caused by the building of the dam and the resulting substantial increase in the ground water table, caused the escape of fine sands by seepage through the sewer joints creating a softening of the sewer foundations. The accumulated effect of the inundation and the escape of the fine sands caused failures in the sewer system and the collapse of the surface, and made the sewers wholly inadequate and impractical for use in connection with disposal of sanitary waste.

To the best of Petitioner's knowledge, no survey was made by the United States, either prior to the construction of the dam or immediately following its construction as to the effect of the dam on Ford City sewage. To this date no settlement was ever made with Ford City.

Subsequent to the building of the dam, the damage to Ford City's sewage system became more and more visible. In view of the lapse of time occurring since the building of the dam, a bill for the relief of Ford City was introduced in 1959 in the United States Congress to compensate Ford City for the damages actually suffered. As a result, an Act was passed which conferred special

jurisdiction upon the United States District Court for the Western District of Pennsylvania to hear, determine, and render judgment on the claim of the Borough of Ford City for damage to its sewage system allegedly due to the construction by the Army of Lock & Dam No. 6 on the Allegheny River.

Pursuant thereto, action was instituted by Petitioner filing a Complaint and an Amended Complaint, to which the Respondent filed an Answer. The Court ruled that the case would first be tried on the issue of liability and then to determine the amount of Petitioner's damages. The parties having filed certain stipulations of fact and the issues being joined, the parties proceeded to non-jury trial.

The District Court, based on its findings of fact and conclusions of law, awarded judgment of liability in favor of Petitioner as plaintiff on the 29th of January 1963. The District Court concluded as a matter of law that Petitioner's sewer system is private property within the meaning of the Fifth Amendment of the United States Constitution and that the United States is liable for compensation and for its damage and destruction resulting from Lock & Dam No. 6 on the Allegheny River. The District Court further concluded that Petitioner's sewage collection system is property having value as such not based solely upon riparian use and separate and apart from any value in connection with the flow of the Allegheny River. The District Court further concluded that, where Petitioner's sewage collection system (exclusive of outfalls) is located beyond the bed of a navigable stream on property not adjacent to the river and has value which does not stem from the

flow of the stream, the value is based on its non-riparian use. Its destruction by the United States by raising a navigable stream beyond its ordinary high water mark and maintaining it continuously at such level so as to permanently raise the ground water table thereby inundating Petitioner's private property is a taking within the meaning of the Fifth Amendment of the United States Constitution which must be compensated. The District Court found as a matter of fact that Petitioner's sewage system has value separate and apart from any value in connection with the riparian use and flow of the Allegheny River. The District Court further found as fact that subsequent to the construction of Lock & Dam No. 6 the ground water table in the Borough of Ford City was raised to a point where approximately one-third of Petitioner's sewers was inundated. The surrounding soil was saturated which is a continuing invasion existing to the present day.

Subsequently, Petitioner and Respondent stipulated and agreed that Petitioner was damaged in the amount of $412,250.00.

The Court of Appeals for the Third Circuit reversed. The Circuit Court held that the Petitioner's property was riparian in nature stating, "It is utterly dependent on the Allegheny. It owes its existence and entire function to that navigable river." The Circuit Court further reversed the finding of fact of the District Court that the ordinary high water mark of the Allegheny River in open river condition had been exceeded.

Reasons for Granting the Writ

I. The decision of the Third Circuit Court of Appeals is squarely in conflict with this Court's decision in *United States v. Kansas City Life Insurance Company,* 339 U.S. 799, 94 L.Ed. 1277 (1949) and with the case of *United States v. Virginia E & P Co.* 365 U.S. 624, 5 L.Ed. 2d 838 (1961).

The *Kansas City* case established the principle that the government is responsible for the taking of land beyond the bed of a navigable stream. The opinion provided that the United States may not in the exercise of its commerce power raise a navigable stream to its ordinary high water mark and maintain it continuously at that level and thereby cause the raising of the ground water table so as to permanently inundate property beyond the bed of the stream, without being liable for the effects of that change. The resulting destruction of the value of the land affected, without actually overflowing it, is a taking within the meaning of the Fifth Amendment of the Constitution of the United States.

The case of *United States v. Virginia E & P Co.* confirmed the *Kansas City* case and provided further that property rights in fast lands beyond the bed of the stream which have value which does not stem from the flow of the stream, the value is based upon its nonriparian use, and its destruction by the United States in the improving of the navigable stream for navigation purposes is a taking within the meaning of the Fifth Amendment of the United States Constitution which must be compensated.

In the instant case the Petitioner suffered damage to the sewage collection system in approximately one-

third of the town as a result of the permanent elevation of the Allegheny River at pool level at Ford City, which is never below 770 feet and usually higher. All of the sewers lower than 773.78 feet had to be replaced. The damage was caused by the underflowing of the land through percolation of the soil and raising the water table which was just as destructive as if the land had been submerged. The soil surrounding the one-third of Petitioner's sewers became saturated, inundating the said sewers. This is a continuing invasion which exists to the present day.

Petitioner constructed its sewage collection system in 1898 in accordance with good engineering practice. Another section was added in 1922. Petitioner has continuously owned and operated this sewer system for its residents. Prior to the construction of Lock & Dam No. 6, Petitioner's sewers operated with little or no difficulty and without the necessity of pumping except in flood or extraordinary high water. After installation of Lock & Dam No. 6 with the resultant permanent high level of the Allegheny River and the filling of the sewers Petitioner was required by necessity to install additional pumps and has caused the pumping of the sewers as a routine procedure to prevent the back-flow into residents' basements. The ground water level was increased to an elevation which permanently inundated approximately one-third of the sewers, causing ground water to seep into the sewers through the joints taking with it the sand surrounding the sewers. When the sewers were pumped, which was necessary to provide capacity for residential sanitary drainage, the rate of inflow of ground water and sand was increased to an accellerated rate. The accumulated effect of the inundation and escape of sand around

the sewers softened the foundation of the sewers, tending toward a void space, causing failures in the sewers and, if continued without replacement, collapse of the surface above the sewer, thereby making the affected sewer wholly inadequate and impractical for use in connection with the disposal of sanitary waste.

The Circuit Court erred in two ways. One in failing to recognize the similarity in the facts in the case of Petitioner and the claimant in the *Kansas City* case and the other in failing to recognize the property value in Petitioner's Sewer System. The Circuit Court attempted to distinguish the two cases, by stating on page 652 "The damaged land [in *Kansas City*] was not on the stream, was in no sense riparian but rather a farm bordering on a non-navigable tributary which entered the navigable stream one and one-half miles below the farm." The point in the *Kansas City* case is not that the land was on a non-navigable tributary, but that it was non-riparian land beyond the bed of the stream. The Petitioner's damaged property is not its sewer outlets in the river, but rather the damaged property is the sewage collection system, the sewer pipes, and the streets which have collapsed. The sewage collection system is non-riparian in use. It is a conduit, an avenue, a means of transportation, which most civilized urban communities in the world have, whether the community be located on the sea shore, along a stream, or surrounded by a desert.

Petitioner's sewage collections were originally disposed of by flowing into the river. This did not make the sewage collection system iteslf riparian. The sewage could have been conducted anywhere and at the present time is pumped by force pumps to a sewage disposal plant which is up-river from Ford City and has a higher elevation then any sewer in town. Further, Petitioner is

still using all of its original sewers except the one-third which was damaged by Respondent and now replaced. As far as the riparian aspect of the outfalls is concerned, the outfalls still exist and were undamaged as such even though they are permanently covered. Petitioner does not ask for damages to outfall or loss of flow in the stream as was the case in *United States v. Twin City Power Company,* 350 U. S. 222 1956), and *United States v. Willow River Company,* 324 U. S. 499 (1945), and to which the Circuit Court purported to compare Petitioner's case.

The *Virginia Case* upheld the *Kansas City* case and provided further that the property beyond the bed of the stream must have value in its non-riparian use. As noted above the Circuit Court completely failed to recognize the value and the functions of Petitioner's sewage collection system.

The Circuit Court, page 653, said, "In any event what we have in the appeal is fairly and plainly a sewer system that is a riparian location unit. It is an operation conceived to take advantage of the use of the flow of a navigable stream. It is utterly dependent on the Allegheny. It owes its existence and entire function to that navigable river."

It is submitted that the Circuit Court was under a complete misconception. The sewer system owes its existence to the fact that it is under the town of Ford City in the same way that a sewer system of any other town owes its existence. Further, the Circuit Court failed to note that no part of the sewer system is on or under riparian land. None of the buildings which it serves is adjacent to the river. The river bank is owned and occupied for the entire length of Ford City by industrial

plants. The collection system has value separate and distinct from the outfalls and the lower court so found. The erroneous logic of the Circuit Court's ruling would be that any town having a collection system which could empty into a navigable stream is riparian but the same system anywhere else would not be riparian.

The Circuit Court further showed its utter lack of understanding by likening Petitioner's case to that of *City of Eufala, Alabama v. United States,* 313 F.2d 745 (5 Cir. 1963), and *City of Demopolis, Alabama v. United States,* 334 F.2d 567 (Ct. Cl. 1964). In the two cited cases the damage suffered was loss of permission by State authorities to dump into a river after the construction of a dam, in each case, because of the reduction in the rate of flow of the river. There was no damage to the sewage collection system itself in either case as contrasted to the severe damage to the instant Petitioner's collection system beyond the bed of the stream. In the *Demopolis* case, the Court further held that claimant might have a claim for flooding a street above ordinary high water mark.

The Circuit Court based its decision on the placing of the pre-dam ordinary high water mark. At the trial both parties presented witnesses to attempt to establish ordinary high water mark. The District Court, based on all the evidence, made its finding that the United States had exceeded ordinary high water mark and had raised the ordinary high water mark on the Allegheny River at Ford City. The Circuit Court on appeal and without having had the benefit of seeing and hearing the witnesses at the trial, completely disregarded Petitioner's witnesses and reversed the District Court's finding of fact as to the ordinary high water mark.

Furthermore, the Circuit Court completely disregarded the doctrine in the case of *U. S. v. Chicago B & Q R. Co.*, 90 F. 2d. 161 (1937), cert. den. 302 U.S. 714. The *Chicago* case clearly defined ordinary high water mark and stated: "The line of ordinary high water divides the upland from the river bed. The river bed is the land upon which the action of the water has been so constant as to destroy vegetation. It does not extend to not include the soil upon which grasses, shrubs and trees grow."

The Circuit Court had no right to impose the added requirement that the vegetation line be an agricultural line. This would result in the ridiculous conclusion that a terrestrial vegetation line could only be found on land suitable for farming, grazing or similar type property and not along developed, hilly, mountainous or wooded areas. Petitioner presented testimony of witnesses as to the location post-dam terrestrial vegetation line and of pre-dam ordinary high water mark in the form of experts and laymen.

The Circuit Court had no right to concern itself with the weight of the evidence and the credibility of the witnesses. Where there is a reasonable basis for the verdict, the appellate court may not judge the credibility of the witnesses and arrive at an opposite conclusion. *Lavender v. Kurn*, 327 U. S. 645, 90 L.Ed. 916 (1946). Unless the verdict is opposed to the physical facts inheritently incredible, the Court on appeal will view the evidence in the light most favorable to the verdict. *Crane Supply Company v. American Insurance* (6 Cir. 1962) 310 F.2d 712 (6 Cir. 1962); cert den. 372 U. S. 961, 10 L.Ed. 124.

However, under the doctrine of the *Kansas City* case and the *Virginia E & P* case, even though Respond-

ent may not have exceeded the ordinary high water mark, the fact that such new permanent invasion of lands beyond the bed of the stream causing a continuing trespass of fast land beyond the bed of the stream having value separate and apart from any riparian use, is compensable under the Fifth Amendment. That is the situation in Ford City.

II. There is a public interest involved herein which is whether the United States may destroy municipal property without liability. The petitioner herein is not an individual, but is a local governmental body. Municipal property is a proper subject of compensation when taken for a public use by a higher echelon of government. *Town of Nahant v. United States* 136 F. 273 (1 Cir. 1905). Because of the interest of the public in the outcome of this case, the writ should be granted.

CONCLUSION

To protect the integrity of this Court's decision in the *Kansas City Life Insurance Company* case, the *Virginia E & P* case, the *Chicago B & Q* case, to acknowledge property value in municipal facilities and to provide compensation under the Fifth Amendment the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NUMBER 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THE BOROUGH OF FORD CITY,
Plaintiff
v.
THE UNITED STATES OF AMERICA
Defendant

Civil Action
No. 60-607

Opinion

WALLACE S. GOURLEY, Chief Judge

Jurisdiction in this civil non-jury proceeding is based on a special act of Congress, Public Law 86-538, 74 Stat. 252.[1] Due to the factual and legal intricacies and complexities which existed, on stipulation of counsel and with the approval of the Court, the proceeding was tried solely as to liability.

The complexity is reflected by reference being made to the report of the Judiciary Committee of the House

1. "... That notwithstanding laches or any statute of limitations, jurisdiction is hereby conferred on the United States District Court for the Western District of Pennsylvania, to hear, determine, and render judgment on the claim of the borough of Ford City, Pennsylvania, for damage to its sewer system allegedly due to the construction by the Department of the Army of a lock and dam designated as lock and dam numbered 6, on the Allegheny River."

of Representatives in which the matter was most thoroughly considered and the involvements were such that it was the judgment of the House Judiciary Committee that the issues and differences should be resolved by the judicial rather than the legislative branch of the government.

Since 1898, the Borough of Ford City (hereinafter sometimes referred to as Borough) has owned and operated a sewage collection system. The system was operated with little or no difficulty until after 1928 when the United States completed construction of Lock and Dam No. 6, on the Allegheny River, about five miles downstream from Ford City. Since the construction of the lock and dam, Ford City has had continuous difficulty, to a substantial degree, with the sewage system. This action is brought to recover damages to the sewage system resulting from the construction, by the United States, of Lock and Dam No. 6, on the Allegheny River.

The questions presented are (1) whether the ordinary high-water mark was raised by the government in connection with the construction on the Allegheny River of Lock and Dam No. 6; (2) if so, whether it was raised to a point about at or above that of the elevation of portions of the sewage system of the Borough; and (3) whether the normal pool level of the river was raised to an elevation above that of the pre-dam ordinary high-water mark.

It is the considered judgment of the Court that each of said questions should be answered in the affirmative.

DISCUSSION OF APPLICABLE LEGAL PRINCIPLES

The Fifth Amendment to the Constitution requires payment of just compensation for a taking of private property for public use. The Borough sewage system is clearly "property." While there may be no property right to discharge sewage into the river, Commonwealth v. Emmers, 221 Pa. 298 (1908), a question which we do not at this time decide, at best, acceptance of this argument would only affect the amount of damages to be received, and not the right to receive damages.

The navigational servitude of the federal government allows it to appropriate, without compensation, when exercising the power of the government to control and regulate navigable waters in the interest of commerce. United States v. Virginia Electric & Power Co., 365 U.S. 624, 627-28 (1961). The dominant power of the federal government extends to the entire bed of the stream, which includes the lands below ordinary high-water mark. United States v. Virginia Electric & Power Co., *supra;* United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Chicago, M., St. P. & Pac. R.R., 312 U.S. 592 (1941). The exercise of the power below the ordinary high-water mark, or within the bed of the stream, is not an invasion of any private property right in such lands for which the United States must pay compensation. *Ibid.*

Thus, it seems to be well settled that, under the Commerce Clause, United States Constitution, Article 1, Section 8, Clause 3, the United States has the power to improve its navigable waters in the interest of navigation without liability for damages resulting to private

property within the bed of the navigable stream. United States v. Kansas City Life Ins. Co., *supra.*

The ordinary high-water mark is the line which separates fast lands from the river bed. United States v. Kansas City Life Ins. Co., *supra;* see United States v. Virginia Electric & Power Co., *supra;* United States v. Twin City Power Co., 350 U.S. 222 (1956). The bed of a river is "that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." United States v. Chicago, M., St. P. & Pac. R.R., 312 U.S. 592, 596 (1941); Alabama v. Georgia, 64 U.S. (23 How.) 505, 515 (1859). This river bed is also the "land upon which the action of the water has been so constant as to destroy vegetation. It does not extend to nor include the soil upon which grasses, shrubs and trees grow." United States v. Chicago, B. & Q. R. Co., 90 F.2d 161, 170 (7th Cir.), *cert. denied,* 302 U.S. 714 (1937); see Oklahoma v. Texas, 260 U.S. 606, 632 (1923).

Even if the questions presented as to the raising of the ordinary high-water mark and the normal pool level are answered in the affirmative and the government is deemed to have exceeded its navigational servitude or privilege, plaintiff cannot recover if the value, or monetary worth, of its sewage system is attributable solely to the flow of the stream and to the riparian location. See United States v. Virginia Electric & Power Co., *supra;* United States v. Twin City Power Co., 350 U.S. 222

(1956). When the United States utilizes or regulates "the flow of the water of a navigable stream there is no 'taking' of 'property' in the sense of the Fifth Amendment because the United States has a superior navigation easement which precludes private ownership of the water or its flow." United States v. Grand River Dam Authority, 363 U.S. 229, 231-32 (1960).

The rule that the United States may improve its navigable waters in the interest of navigation without liability for damages resulting to private property within the bed of the navigable stream would unquestionably have application to the situation where the United States constructs a dam in the interest of improving the navigable stream, and damage resulting from the construction would constitute an invasion of the property rights of the Borough only if the construction of the dam raises the ordinary high-water mark beyond that which existed prior to the construction of the dam or the normal pool level beyond the pre-dam ordinary high-water mark. United States v. Kansas City Life Ins. Co., *supra.*

So, when the federal government improves navigable streams by means of locks and dams in the interest of navigation and thereby raises the ordinary high-water mark of the navigable stream or the normal pool level beyond the pre-dam ordinary high-water mark, and private property is damaged in whole or in part, said taking on the part of the government is in subordination to the Fifth Amendment and subject to the responsibility of the government for damages that are sustained as a proximate result thereof. See United States v. Virginia Electric & Power Co., *supra;* United States v. Cress, 243 U.S. 316 (1917).

In short, the United States is liable for the destruction of the property owner's rights where the destruction is caused by raising the ordinray high-water mark of the navigable stream or the normal pool level beyond the pre-dam ordinary high-water mark, even though the ordinary high-water mark or normal pool level was raised in the interest of navigation or in pursuance of improving a navigable stream. United States v. Kansas City Life Ins. Co., *supra*. Furthermore, if the navigational servitude is exercised above the ordinary high-water mark, beyond the bed of the river, it is irrelevant that damage might have been caused by the underflowing of the land through percolation of the river waters rather than by flooding. See United States v. Kansas City Life Ins. Co., *supra*.

On the basis of the above legal principles, it is the considered judgment of the Court, after full and complete hearing and meticulous review of the record and evaluation of applicable law that (1) the construction of Lock and Dam No. 6 did raise the ordinary high-water mark to and above the elevation of portions of the sewage system and the normal pool level above the pre-dam ordinary high-water mark, (2) the value of plaintiff's sewage system is not attributable solely to the flow of the Allegheny River and to its riparian location but instead, the sewage system has value independent of the flow of the stream and the riparian location, value which has been damaged by the acts of defendant to an extent to be determined at the trial of the damages issue and therefore (3) the Borough of Ford City is entitled to recover against the United States.

FINDINGS OF FACT.

1. Plaintiff, Borough of Ford City, (hereinafter referred to as Borough) is a municipal corporation located in Armstrong County in the Commonwealth of Pennsylvania. It received its charter in 1898 and has operated as a borough form of government continuously since that time. It is situated on the left or easterly bank of the Allegheny River, one of the navigable waterways of the United States.

2. Borough brings this action pursuant to the Act of Congress approved June 29, 1960, Public Law 86-538, 74 Stat. 252, which confers jurisdiction upon this Court, notwithstanding laches or any statute of limitations, to ". . . hear, determine, and render judgment on the claim of the borough of Ford City, Pennsylvania, for damage to its sewer system allegedly due to the construction by the Department of the Army of a lock and dam designated as lock and dam numbered 6, on the Allegheny River."

3. The principal townsite has an approximate elevation of 782 feet.

4. Borough constructed its sewage collection system in 1898 in accordance with good engineering practice and in reliance on the natural level, temporary high waters, width and flow of the Allegheny River in its natural open river condition existing prior to the effect of Lock and Dam No. 6 on the river's elevation and high-water mark. Another section was added to this system in 1922. Borough has continuously owned and operated this sewer system for its residents. The system works by gravity flow with three outfalls into the Allegheny River.

Sometime prior to October, 1928, the three outfalls discharged raw sewage directly into the Allegheny River at the following locations and elevations:

Location	*Elevation at River*	
	Invert[2]	*Crown*[3]
First Street	765.61	770.28
Eighth Street	764.04	768.54
Power House Alley	768.01	771.34

5. The elevations of the inverts of the sewer lines at various locations within the city which feed into the sewer outfalls are as follows:

First Street Outlet:

Location	*Elevation*
Pump house south of First St. on Third Ave.	767.43
First St. and Fifth Ave.	768.50
Second St. and Fifth Ave.	769.10
Third St. and Fifth Ave.	770.23
Second St. and Third Ave.	769.13
Third St. and Third Ave.	770.14
Fourth St. and Third Ave.	771.59
Fourth St. and Fourth Ave.	771.96
Fourth Ave. and Fifth Ave.	770.33
Fourth St. and Fifth Ave.	772.12

Eighth Street Outlets:

Eighth St. and Third Ave.	767.88
Eighth St. and Fourth Ave.	768.13
Eighth St. and Fifth Ave.	769.37
Eighth St. and Sixth Ave.	770.60
Ninth St. and Sixth Ave.	772.22
Alley south of Ninth St. and Fifth Ave.	771.31

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2. Invert refers to the bottom of the inside of the pipe.

3. Crown refers to the top of the inside of the sewer pipe.

Location	*Elevation*
Ninth St. and Fourth Ave.	772.27
South Ninth St. and Third Ave.	769.59
Seventh St. and Third Ave.	775.06
Seventh St. and Fourth Ave.	770.40
Seventh St. and Fifth Ave.	770.74
Seventh St. and Sixth Ave.	772.72
Power House Alley Outlet:	
Power House Alley and Third Ave.	769.91
Power House Alley and Fourth Ave.	772.91
Twelfth St. and Third Ave.	773.78

6. In a state of nature the elevation of the flows of the Allegheny River varied considerably between periods of high flow and low flow.

7. In the interest of navigation and pursuant to the direction of Congress (37 Stat. 201, 216; H. Doc. 540, 62nd Cong., 2nd Sess.), the Corps of Engineers of the United States Army constructed Lock and Dam No. 6 to an elevation of 769 feet mean sea level. Lock and Dam No. 6 was completed in October, 1928, and is located on the Allegheny River at Clinton about five miles south and downstream from Ford City.

8. Lock and Dam No. 6 was built to a height of approximately 769 feet and created a pool suitable for slack water navigation. This resulted in the pool level at Ford City being increased from approximately 760 feet above sea level to approximately 770 feet above sea level.

9. Prior to the construction of Lock and Dam No. 6, the Borough's sewers operated with little or no difficulty and without the necessity of pumping except in periods of flood or extraordinary high waters.

10. The permanent high level of the Allegheny River and the filling of the sewers has necessitated the installation of additional pumps by the Borough and has required the pumping of the sewage system as a routine procedure to prevent the backflow into basements of properties of Borough's residents.

11. In order to fix the location of the pre-dam ordinary high-water mark, it was necessary to determine the elevation of the existing ordinary high-water mark and translate it into the location of the pre-dam ordinary high-water mark. This was done by utilizing the amount of flow of water necessary to reach the present ordinary high water mark and by determining where this same amount of flow of water would come on the banks of the stream in open river conditions.

12. On the basis of all the evidence introduced at the trial, the post-dam ordinary high-water mark at the average point in the Borough is 773.78 feet. The pre-dam ordinary high-water mark was 766.8 feet.

13. The ordinary high-water mark was raised by the government in connection with the construction on the Allegheny River of Lock and Dam No. 6 to a point about at or above that of portions of the sewage system of the Borough and the normal pool level of the river was raised to an elevation above that of the pre-dam ordinary high-water mark.

14. Underneath the soil located at Ford City, there is a stratum of water-bearing fine sand and gravel.

15. Ground water table is the top level of the ground water at any particular time. There is a direct relationship between the level of the river and the

ground water table. If the river itself rises, there will be a flow back from the river into the soil which raises the water table, the elevation of which slopes upward away from the river banks.

16. When the dam raised the normal pool level of the Allegheny River to 770 feet at the Borough and maintained the elevation continuously at that level and at higher levels due to normal fluctuation of flow for protracted periods of time, and raised the ordinary high-water mark at the average point in the Borough to 773.78 feet, this affected approximately one-third of plaintiff's sewerage system at elevations up to 773.78. The damages caused by the underflowing of the land through percolation of the soil and raising of the water table, and aggravated by the need for increased pumping, was just as destructive as if the land had been submerged.

17. Subsequent to the construction of Lock and Dam No. 6, the ground water table at the Borough was raised to a point where approximately one-third of plaintiff's sewers were inundated, the surrounding soil being saturated. This is a continuing invasion which exists to the present day.

18. Plaintiff's sewage system has value separate and apart from any value in connection with the riparian use and flow of the Allegheny River.

CONCLUSIONS OF LAW

1. By the Act of June 29, 1960, Public Law 86-538, 74 Stat. 252, jurisdiction was conferred upon this Court to "hear, determine, and render judgment on the claim of the Borough of Ford City, Pennsylvania, for damage to its sewer system allegedly due to the construction by the Department of the Army of a lock and dam designated as lock and dam numbered 6, on the Allegheny River."

2. The action of the United States in constructing Lock and Dam No. 6, on the Allegheny River, was taken pursuant to an appropriate act of Congress and in furtherance of its power over navigation.

3. Plaintiff's sewer collection is private property within the meaning of the Fifth Amendment to the United States Constitution, and the United States is liable for compensation for its damage and destruction resulting from the construction of Lock and Dam No. 6.

4. Plaintiff's sewer collection system is property having value, as such, not based solely upon riparian use and separate and apart from any value in connection with the flow of the Allegheny River.

5. Since the United States raised the level of the Allegheny River by the construction of Lock and Dam No. 6 and, in so doing, exceeded the ordinary high-water mark causing damage to approximately one-third of plaintiff's sewer system, the government is liable for damages sustained.

6. Where plaintiff's sewage collection system (exclusive of outfalls) is located beyond the bed of the navigable river on property not adjacent to the river and has value which does not stem solely from the flow

of the stream, that value is based on its non-riparian use. Its destruction by the United States, by raising a navigable stream beyond its ordinary high-water mark and maintaining it continuously at such level so as to permanently raise the ground water table thereby inundating plaintiff's private property, is a taking within the meaning of the Fifth Amendment to the United States Constitution which must be compensated.

CONCLUSION

The Borough of Ford City is therefore entitled to recover such damages as were sustained as the proximate result of the United States of America raising, as a result of the construction of Lock and Dam No. 6, the ordinary high-water mark level of the Allegheny River to an elevation to and above that of the Borough's sewage system and the normal pool level of the river above the pre-dam ordinary high water mark.

An appropriate order is entered.

Order

AND NOW, THIS 29th day of January, 1963, judgment of liability is hereby entered in favor of the plaintiff, The Borough of Ford City, and against the defendant, the United States of America.

/s/ WALLACE S. GOURLEY, CDJ
Chief Judge

cc: JOHN B. MCCUE, ESQ., for the Planitiff
342 Market Street
Kittanning, Pennsylvania
GEORGE P. CHENEY, JR., ESQ., for the Plaintiff
Pittsburgh Plate Glass Co.
JOSEPH S. AMMERMAN, ESQ., for the Defendant
United States Attorney

NUMBER 2

Stipulation of Settlement

It is hereby agreed that judgment shall be entered in favor of the Borough of Ford City and against the United States in the amount of $412,250 without prejudice to the right of the Government to appeal as to liability and without prejudice to the Borough of Ford City to attack such appeal.

Respectfully submitted.

/s/ JOHN B. MCCUE
JOHN B. MCCUE

/s/ GEORGE P. CHENEY, JR.
GEORGE P. CHENEY, JR.
Attorneys for the Plaintiff

/s/ GUSTAVE DIAMOND
GUSTAVE DIAMOND
United States Attorney

/s/ HOWARD O. SIGMOND
HOWARD O. SIGMOND

/s/ ARTHUR AYERS, JR.
ARTHUR AYERS, JR.
Attorneys for the Defendant

Order of Court

And now, this 4th day of November, 1963, judgment of liability having been entered into in favor of the plaintiff, Borough of Ford City, and against the defendant, The United States, the 29th day of January, 1963, and stipulation and agreement of counsel for both parties in the above entitled matter having been filed, judgment of damages is hereby entered in favor of the plaintiff, Ford City Borough, and against defendant, The United States, in the amount of $412,250.

/s/ WALLACE S. GOURLEY
Chief Judge

NUMBER 3

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14832

BOROUGH OF FORD CITY,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued October 22, 1964
Before McLAUGHLIN, KALODNER and HASTIE,
Circuit Judges.

Opinion of the Court
(Filed April 28, 1965)

By McLAUGHLIN, *Circuit Judge.*

Plaintiff-appellee is a municipality of the Commonwealth of Pennsylvania. This litigation arose out of alleged damage to its sewer system claimed to have been due to the construction in 1928 by the Department of the Army of a lock and dam on the Allegheny River about five and a half miles below Ford City. Suit was filed September 20, 1960, solely on the authority of a special jurisdictional act of Congress (P.L. 86-538, 74 Stat. 252) which eliminated laches and any statute of limitations in connection therewith. The amended com-

plaint is based upon the Fifth Amendment, "* * * nor shall private property be taken for public use without just compensation."

In 1928, plaintiff owned and operated, as it still does, a gravity flow sewer system which flowed into the Allegheny. At that time, defendant, in connection with its work of improving the navigation on the Allegheny by deepening its channel, built a lock and dam across its bed at Logansport. It is admitted that the Allegheny River generally and particularly at Ford City, is a navigable stream. It is stipulated that after the erection of the lock and dam, the pool elevation at Ford City approximated 770 feet mean level (hereinafter ft. m.s.l.) for protracted periods. Plaintiff claims that the installation of the lock and dam caused a rise of about 10 feet at the Ford City sewer outlet which caused serious damage to the system, the city's streets and necessitated constant pumping operations.

As its first point appellee urges that appellant's appeal is out of time. What happened was that the issue of liability was tried to the court. Judgment as to liability was entered January 29, 1963. That was an interlocutory order not appealable. Victor Talking Machine Co. v. George, 69 F.2d 871 (3 Cir. 1934), 105 F.2d 697 (3 Cir. 1939), cert. den. 308 U.S. 611; Milbert v. Bison Laboratories, 260 F.2d 431 (3 Cir. 1958). The trial judge recognized this at a pretrial conference April 16, 1962 when he was reminded by counsel of a previous discussion with him concerning the Government appeal situation in the event there was a finding against the Government, with particular reference to the "* * * question of having a stay order entered [as to the damage issue]

so that we might pursue the question of appeal in case of adverse ruling." The court as to this said, "The statement I heretofore made, I retract that and will not do that. * * * I will not give you a certificate of appeal." Subsequently the suit was called for trial on the damage branch. At that time a stipulation of what was really a contingent settlement was entered into by the parties through their attorneys which was expressly "* * * without prejudice to the right of the Government to appeal as to liability and without prejudice to the Borough of Ford City to attack such appeal." The order of the court of November 4, 1963, notes that "* * * stipulation and agreement of counsel for both parties in the above entitled matter having been filed, judgment of damages is hereby entered * * *." Notice of appeal by the defendant was filed the following day, November 5, 1963. The appeal was within time and is properly before this court.

It is accepted by the plaintiff and the trial judge, as it must be, that the navigational servitude of the Federal Government allows it to take private property without compensation when it is controlling and regulating navigable waters in the interest of commerce. This governmental right extends to the entire bed of the stream involved, including the lands below the ordinary high-water mark; the converse of this is also true i.e. "* * * the Government must compensate for any taking of fast lands which results from the exercise of the power." United States v. Virginia Electric & Power Co., 365 U.S. 624, 627-628 (1961). However, the Government, in the exercise of the navigation servitude can raise the water level above the ordinary high-water mark and not be liable. If the value of the property is due to the flow of the stream and the riparian location, there is no ac-

tual taking of property which requires compensation because of the Fifth Amendment. United States v. Willow River Co., 324 U.S. 499 (1945); United States v. Twin City Power Co., 350 U.S. 222 (1956). That rule makes the dominant practical issue before us, whether the Government by its construction of the lock and dam raised the Allegheny River ordinary high-water mark in the area of the Ford City sewer outlet. If it did, the defendant is responsible for any damage caused plaintiff by reason thereof.

The district court held that defendant's construction had raised the ordinary high-water mark. Its authority for this is a quotation from the decision in United States v. Chicago B & Q R. Co., 90 F.2d 161, 170 (7 Cir. 1937), cert. den. 302 U.S. 714, which states: "The river bed is the land upon which the action of the water has been so constant as to destroy vegetation. It does not extend to nor include the soil upon which grasses, shrubs and trees grow." From this the judge concluded that the ordinary high-water mark of the Allegheny was where vegetation is destroyed. Actually this is not the teaching of Harrison v. Fite, 148 Fed. 781, 783 (8 Cir. 1906), upon which the Chicago B & Q R. Co. expressly relies. Harrison holds primarily that the bed of a river "* * * is that soil so usually covered by water that it is wrested from vegetation and its value for agricultural purposes is destroyed." Howard v. Ingersoll, 54 U.S. 380 (1851), upon which Harrison in turn is based and which is the leading opinion on the particular point, makes it very clear that the vegetation test for a navigable stream's ordinary high-water mark means not that within such line all vegetation has been destroyed by the water covering the soil but that the soil has been covered by water

for sufficient periods of time to destroy its value for agricultural purposes." The Howard opinion, p. 415, defining the outer line of the bed of the river there involved said:

> "It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. But it may include spots lower than the bluff or bank, whether there is or is not a growth upon them, not forming a part of that land which, whether low or high, we know to be upland or fast lowland, if such spots are within the bed of the river. Such a line may be found upon every river, from its source to its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water."

This principle is followed in a great number of well considered opinions some of which are cited below.[1] We are satisfied that the sound law as to what constitutes the river bed of a navigational stream is as carefully

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1 Paine Lumber Co. v. United States, 55 Fed. 854, 864-865 (E.D. Wis. 1893); City of Cedar Rapids v. Marshall, 199 Iowa 1262, 203 N.W. 932 933 (1952); Dow v. The Electric Co., 69 N.H. 498, 45 Atl. 350 (1899); Hartley v. Crawford, 81½ Pa. 478, 485 (1875); Rutten v. State, 93 N.W. 2d 796, 799 (N.D. 1958); In re Minnetonka Lake Improvement, 56 Minn. 513, 58 N.W. 295, 297 (1894); Welch v. Browning, 115 Iowa 690, 87 N.W. 430, 431 (1901).

outlined in the Harrison opinion i.e. the land upon which the waters have visibly asserted their dominion, the value of which for agricultural purposes has been destroyed. The value for agricultural purposes is destroyed where terrestrial plants not all plant life ceases to grow. Just as definitely the same law is that the bed of such stream "* * * does not extend to or include that upon which grasses, shrubs and trees grow though covered by the great annual rises." Harrison v. Fite, supra 783.

The vegetation test is useful where there is no clear, natural line impressed on the bank. If there is a clear line, as shown by erosion, and other easily recognized characteristics such as shelving, change in the character of the soil, destruction of terrestrial vegetation, and litter, it determines the line of ordinary high-water. Rutten v. State, 93 N.W. 2d 796, 799 (N.D. 1958); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914); Willis v. United States, 50 F.Supp. 99 (W.Va. 1943). Also a test of the distinct line is the destruction of terrestrial vegetation so these are not really two separate tests but must, of necessity, complement each other.

Another important consideration in determining the line is the character of the bank or shore at the particular site in issue. If it is difficult to ascertain the line of ordinary high-water at this site, recourse may be had to other sites along the same stream to determine the line. Diana Shooting Club v. Husting, supra at 820.

Having the above fundamentals in mind, the factual situation before us is simply determined. Appellee depended upon its witness Shannon for the fixing of the 1928 pertinent Allegheny River ordinary high-water

mark. This was Shannon's first attempt to determine such a location. He minored in engineering and majored in forestry. He was asked by appellee's attorney, "You are in practice at this time as an engineer in forestry. Is that correct?" He answered:

> "Well, I have a firm of professional service individuals, providing services in engineering, forestry, surveying, landscape architecture and other related fields such as architecture, photogrammetry,"

He said he was engaged by appellee "concerning an observation of vegetation along the Allegheny River." Then he was asked by the attorney for the appellee, "What did you do in regard to this observation?" He answered:

> "Well, first I consulted with yourself, counselor, and with the borough engineer, primarily to find out what the purpose of this observation was. And mention had been made of a term known as ordinary high water which I was unable to find any description or definition of, by perusal of standard engineering references. And upon advice that the vegetation was probably the most important factor plus my own reconnaissance of the river banks throughout the regions of Ford City, I concluded that the vegetation would probably be the item which we could observe with some reasonable degree of achieving a result."

Shannon said that he found a line where vegetation ceased to grow and took readings of the elevations at various points, all within 6,350 feet of the river bank which was also in the immediate vicinity of Ford City itself. It was admitted that in this area it was hard to

find points where measurements could be taken. On cross-examination he was asked the following question and replied as stated:

> "Q. Did you have an opportunity of consulting with your counsel to consider the language of the legal cases on the subject, of what the law considered the ordinary high water mark to be? A. Well, I concluded that ordinary high water mark was a legal term, but I couldn't find it in the engineering references and I couldn't honestly find on the river banks which might, in a legal way, establish ordinary high water marks with the exception of vegetation.
>
> "Q. My question was, did you read any cases or did your counsel refer you to any language that is quoted in the legal cases, which defined ordinary water line? A. I believe he quoted some language to me, but I couldn't restate it verbatim."

The final question to Shannon on cross-examination and his answer thereto were:

> "Q. *This area down to the line that you selected, could it be used for agricultural purposes?* A. *No.*" (Emphasis supplied).

The defense moved to strike the Shannon testimony on the ground "* * * that when he made his examination he was not looking for a vegetation line as defined by the courts generally but was sent out merely to look for a line in which he thought that he could find the effect of the river on vegetation, and that he, in the absence of having further instruction in the matter, was really not qualified to arrive at a decision as to which line should

have been considered." That motion was denied. The trial court's finding of fact that "* * * the post-dam ordinary high-water mark at the average point in the Borough is 773.78 feet." Borough of Ford City v. United States, 213 F.Supp. 248, 254 (1963) is the exact Shannon mathematical calculation, the sole source of such figure in the trial transcript. It is agreed that given the post-dam ordinary high-water mark with other available data, the pre-dam ordinary high-water mark is readily ascertainable. Using the Shannon post-dam figure, the pre-dam mark would be 766.8 feet. The Shannon pre-dam ordinary high-water mark which was also his alone, was found by the court as a fact.

Edward F. Twomey, a consulting engineer, employed by Ford City in connection with its sewage plant was also a plaintiff's witness. His testimony will be dealt with at length later in this opinion.

Testimony on behalf of appellant was given by Dr. Hartman of the University of Pittsburgh who holds a doctorate in botany and is a specialist in limnology. He had made an exhaustive survey of the critical river location. A number of pictures taken by him on his survey were explained by him and marked into evidence. He testified at length of finding the transition line between the area of essentially terrestrial plant communities and the area affected by repeated inundation. He did not blieve that there would be any agricultural use or value to the land below that line. His post-dam ordinary high-water marks were, at the First Street outlet, 776.4 ft. m.s.l.; near Eighth Street Extended, 776.9 ft. m.s.l. and at the powerhouse, 777.1 ft. m.s.l.

E. M. Cole, chief of the planning and reports section of the Corps of Engineers also testified in the appellant's case. He had made a study of the Allegheny post-dam high-water mark at Ford City. Despite constant harassing examination by the trial judge, Mr. Cole testified thoroughly and explicitly to the vital change in the character of the vegetation and of the river bank in the particular section and of finding the impress of the line of ordinary high-water. In his judgment the river flow of 62,000 c.f.s. (cubic feet per second) at Ford City gave the correct profile of post-dam ordinary high-water. From that source material the witness calculated the post-dam high-water at the three sewer outlets as 776.5 ft. m.s.l., 776.9 ft. m.s.l. and 777.1 ft. m.s.l. Converting the flow to open river or pre-dam conditions resulted in corresponding pre-dam ordinary high-water elevations of 771.4 ft. m.s.l., 772.5 ft. m.s.l. and 772.9 ft. m.s.l.

Dr. Philbrick, a Corps of Engineers geologist strongly supported the testimony of the witnesses Hartman and Cole as to the natural high-water line they had found.

The Government witnesses all made use of shelving, erosion, and litter in substantiation of their findings. The latter covered the entire pool expanse not just the limited section in the vicinity of Ford City.

In response to a question by the court, plaintiff's witness Twomey said, "Ordinary high water is a very confusing word to me." The attorney for Ford City asked him, "Mr. Twomey, you stated that you arrived at an opinion from observing photographs as to the vegetation line on the fourteenth of April, with a flow of about 39,000 feet. Is that correct?" The witness an-

swered "Between 39 and 40,000." Again replying to the court the witness said, "* * * In other words, we assume that if the vegetation — *assuming that 40,000 is correct* — cubic feet per second — we know that under present date condition, the elevation in the Allegheny River would be 755½." (Emphasis supplied). During the Twomey evidence, the court suggested to counsel for Ford City that he introduce the pictures that had been made by United States Engineers in the course of a joint plaintiff and defense tour by barge of the Allegheny River in the environs of Ford City. The attorney said "I don't care to introduce them, your Honor." Mr. Twomey had not been abroad the barge. The Ford City attorney stated that there had been quite a bit of disagreement as to the proper spots to take pictures and exactly where the vegetation line was. He advised the court that "Mr. Shannon, an engineer representing the city, Ford City, was present * * * He is prepared to take the stand and testify on what he believed the high water is, as a result of that." The judge then commented: "Again, as I have told you men many times before, I think Congress wanted you fellows to do something about adjusting it." He went on to note the adversary attitude between counsel for the parties.

The above gives some idea of the vagueness and lack of quality of the Twomey evidence with respect to the specific trial issues. We have above noted that the court's crucial finding of fact adopted Shannon's computation of the post-dam and pre-dam ordinary high-water mark. It would necessarily follow from this that the present agreed Allegheny pool elevation of 770 ft. is higher than Shannon's ordinary high-water mark of

766.8 ft. and that the dam construction was the cause thereof.

The district judge as trier of the fact was justified in disregarding Twomey's testimony but in accepting and depending upon the Shannon evidence he erred in law. He categorically held that the Allegheny River bed at Ford City is "land upon which the action of the water has been so constant as to destroy vegetation." Borough of Ford City v. United States, 213 F.Supp. 248, 251 (W.D.Pa. 1963). This was also Shannon's foundation in arriving at his mathematical conclusion of the post-dam high-water mark. As we have earlier detailed this is not the law. What the river or action of the water actually destroys is the value of its soil for agricultural purposes. The difference between the two definitions is vital here and generally and is readily discernible. It is merely a question of using the proper norm. By applying the latter, plus the additional tests, Messrs. Cole and Hartman found that the pre-dam ordinary high-water mark was 771.4, 772.5, 772.9 ft. m.s.l. at the three outlets. All of these marks are well above the admitted present pool level of 770 ft. m.s.l. The accuracy of the defense calculation was not challenged. It was the correctness of the line where the defense witnesses had located it by actual expert observation that was disputed.

Appellee argues strenuously in its brief that "The fact that the trial court found post-dam ordinary high-water mark to be the same as that testified to by the witness Shannon is not appealable." It anchors this on the proposition that the court had the right to rely on the testimony of that single expert witness "* * * despite other testimony to the contrary and the Court of Ap-

peals is not privileged to overrule the trial court." Appellee either misconceives the Shannon problem or refuses to face up to it. This is not a question of credibility of witnesses or weight of evidence. It is simply that Shannon's opinion evidence of situs of the post-dam ordinary high-water mark was totally predicated on a legally wrong premise. The test for ascertaining that mark passed along to him for his use was erroneous. The trial judge, forming his conception of the mark from the same source, accepted Shannon's findings and rested his decision completely on those findings. In this resultant situation reversal of the judgment and remand of the matter to the district court for the entry of judgment in favor of the defendant-appellee is indicated.

On the second point involved in this appeal the trial court holds in its opinion: "So, when the federal government improves navigable streams by means of locks and dams in the interest of navigation and thereby raises the ordinary high-water mark of the navigable stream or the normal pool level beyond the pre-dam ordinary high-water mark, and private property is damaged in whole or in part, said taking on the part of the government is in subordination to the Fifth Amendment and subject to the responsibility of the government for damages that are sustained as a proximate result thereof. * * * Furthermore, if the navigational servitude is exercised above the ordinary high-water mark, beyond the bed of the river, it is irrelevant that damage might have been caused by the underflowing of the land through percelation of the river waters rather than by flooding. See United States v. Kansas City Life Ins. Co., supra." On that basis the court found (1) that the dam did so raise "* * * the ordinary high-water mark * * * and the

normal pool level above the pre-dam ordinary high-water mark," and (2) "the value of plaintiff's sewage system is not attributable solely to the flow of the Allegheny River and to its riparian location but instead, the sewage system has value independent of the flow of the stream and the riparian location, value which has been damaged by the acts of defendant to an extent to be determined at the trial of the damages issue and therefore (3) the Borough of Ford City is entitled to recover against the United States." Borough of Ford City v. United States, supra, p. 252.

It is worthy of note that the ultimate holding on this phase of the appeal is again dependent on the raising of the pre-dam high-water mark which we have found did not occur.

Plaintiff-appellee in its brief under the caption of "The Court of Appeals has no right or duty to concern itself with the weight of the evidence or the credibility of witnesses" states that one of the principles governing the determination of whether there was a taking of its property under the Fifth Amendment "* * * is that the United States may not, in the exercise of its commerce power, raise a navigable stream to its ordinary high-water mark and maintain it continuously at that level in the interest of navigation without being liable for the effects of that change in the destruction of property beyond the bed of the stream." It says further that "* * * if the United States raised a navigable stream permanently to its ordinary high-water mark and thereby causes the raising of the ground water table so as to permanently inundate property beyond the bed of the stream, the United States is liable for the effects of that

change in the destruction of property beyond the bed of the stream. The district court found that the river was permanently raised at Ford City to a point exceeding pre-dam ordinary high-water mark and that approximately one-third of plaintiff's sewers were permanently inundated by the under-flowing of the land through percolation."

The conclusion of plaintiff's brief reads:

"CONCLUSION

"It is submitted that the Circuit Court of Appeals has no jurisdiction to hear this appeal because of failure of the defendant to take timely appeal from the judgment on liability dated January 29, 1963 and/or because the defendant by actions of its attorneys is estopped from filing this appeal after 60 days from date of the judgment of January 29, 1963. The appeal should be denied for the further reasons that the district court did adopt the correct standard in determining high water mark; that the Circuit Court of Appeals has no right or duty to concern itself with the weight of the evidence or the reliance of the district court on the testimony of a single expert witness despite other testimony to the contrary."

As seen plaintiff also founds its claim for damages to the sewer system beyond the bed of the Allegheny squarely upon the alleged raising of the river to a point beyond the pre-dam ordinary high-water mark. Both the court and the plaintiff assert that their general contention on this point is supported by United States v. Kansas City Ins. Co., 339 U.S. 799 (1950). The facts in that decision differ radically from those in this appeal.

There was no pre-dam, post-dam problem in that suit. There the Government by means of a dam raised a navigable stream to its ordinary high-water mark and maintained it continuously thereafter in the interest of navigation. The damaged land was not on the stream, was in no sense riparian but rather a farm bordering on a non-navigable tributary which entered the navigable stream one ane one-half miles below the farm. The recent United States Supreme Court opinion in United States v. Virginia Electric and Power Co., 365 U.S. 624, 628 (1960) gives us the tight scope of the Kansas City holding:

> "Since the privilege or servitude only encompasses the exercise of this federal power with respect to the stream itself and the lands beneath and within its high-water mark, the Government must compensate for any taking of fast lands which results from the exercise of the power. This was the rationale of United States v. Kansas City Ins. Co., 339 U.S. 799, where the Court held that when a navigable stream was raised by the Government to its ordinary high-water mark and maintained continuously at that level in the interest of navigation, the Government was liable 'for the effect of that change [in the water level] upon private property beyond the bed of the stream.' 339 U.S., at 800-801. See also United States v. Willow River Co., 324 U.S. 499, 509."

United States v. Cress, 243 U.S. 316 (1917), similarly to Kansas City, concerned a Government improvement on a navigable stream which cause the flooding of plaintiff's land in and adjacent to a non-navigable stream. Compensation for the damages land was

granted. Directly pointing to the narrow restriction of the tributary doctrine is United States v. Willow River Power Co., supra. In that action compensation was sought for the reduction of a power head caused by a Government dam which raised the level—above the ordinary high-water mark—of the navigable river into which the Power Company dropped the water from its dam built on a non-navigable tributary. The claim was denied because the company's loss of power occurred within the bed of the navigable river where the Government had the right to change the river's level in the interest of navigation. The Court held that Cress did not apply; that in Cress "* * * the navigation interest was held not to be a dominant one at the property damaged; here dominance of the navigation interest at the St. Croix [the navigable river] is clear." p. 506. In addition Willow River determined that this taking did not require compensation because the value of power head was inherent in the flow of the stream and its riparian location.

The property before us assertedly damaged is a gravity flow sewer system[2] designated and constructed by this Allegheny riverside municipality to obtain the natural advantage of dumping the city sewage directly into the navigable stream and so, disposing of it. Whether this was commendable sanitation practice is not at issue. The trial court found that there was some underflow from the river which produced harm to the

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2. See also City of Eufaula, Alabama v. United States, 313 F.2d 745 (5 Cir. 1963); City of Demopolis, Alabama v. United States, 334 F.2d 657 (Ct. Cl. 1964). These cases also deal with the alleged taking of a gravity flow sewer system by the United States in the exercise of its navigational servitude.

sewer pipes and necessitated increased pumping which "was just as destructive as if the land was submerged." It should be said here that there is not one word of testimony that any Ford City fast land whatsoever was harmed in the slighest. Nor is there the faintest support in the record that a modern sewer system, replacing the 1898 model before us, would not obviate whatever difficulty that may be existing.

In any event what we have in this appeal is fairly and plainly a sewer system that is a riparian location unit. It is an operation conceived to take advantage of the use of the flow of a navigable stream. It is utterly dependent on the Allegheny. It owes its existence and entire function to that navigable river. As the Supreme Court held in Willow River, p. 506, "* * * here dominance of the navigation interest * * * is clear." To same effect United States v. Twin City Power Co., supra. The Kansas City formula, such as it is, by its very terms has no bearing on this litigation.

The judgment of the district court will be reversed and the case remanded to that court for the entry of judgment in favor of the defendant appellant.

A TRUE COPY:
TESTE:

Clerk of the United States Court of Appeals for the Third Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 454

BOROUGH OF FORD CITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31–48) is reported at 345 F. 2d 645. The opinion of the district court (Pet. App. 16–30) is reported at 213 F. Supp. 248.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1965. Petition for rehearing was denied on May 26, 1965. The petition for certiorari was filed on August 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly reversed the trial court on the ground that the latter had ap-

plied the wrong test in determining the location of the ordinary high water mark of a navigable stream.

2. Whether the United States must pay compensation under the Fifth Amendment for the inundation of a municipal sewer system located in a town bounded by a navigable stream resulting from raising the level of the stream to a point within the limits of the ordinary high water mark, and maintaining it at that elevation for extended periods.

STATUTES INVOLVED

Public Law 86-538, approved June 29, 1960, 74 Stat. 252, provides:

AN ACT

For the relief of the borough of Ford City, Pennsylvania

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding laches or any statute of limitations, jurisdiction is hereby conferred on the United States District Court for the Western District of Pennsylvania, to hear, determine, and render judgment on the claim of the borough of Ford City, Pennsylvania, for damage to its sewer system allegedly due to the construction by the Department of the Army of a lock and dam designated as lock and dam numbered 6, on the Allegheny River.

SEC. 2. Proceedings shall be instituted any time within 90 days after the date of the enactment of this Act.

STATEMENT

This case was instituted by the Borough of Ford City in Pennsylvania by the filing of a complaint on September 20, 1960, in the United States District Court for the Western District of Pennsylvania, pursuant to a special jurisdictional Act of Congress (P.L. 86–538, 74 Stat. 252, *supra*). The Act did not create an independent basis of recovery, but merely conferred jurisdiction on the district court to hear, determine and render judgment on the claim of Ford City for damage to its sewer system allegedly due to the construction of Lock and Dam No. 6 on the Allegheny River, notwithstanding laches or any statute of limitations.

The complaint alleged that the cause of action arose under the Fifth Amendment; that plaintiff owned and operated a sewer system which flowed into the Allegheny River at approximate elevation of 766 feet mean sea level USGS datum (hereafter m.s.l.); that in 1928 the United States, in improving navigation on the Allegheny River, constructed and put into operation Lock and Dam No. 6 about four miles below Ford City for the purpose of deepening the river channel for navigation; that the effect was to raise the elevation of the water opposite the City to a level of 770 feet m.s.l. for protracted periods; that as a consequence, the City had to increase the pumping capacity of its sewer system and to pump its sewage at more frequent intervals; and that, since the sewers were constructed with cement mortar joints, there was an escape of fine sand through the imperfect

joints which undermined the foundation and caused failures in the sewer system (Def. App. 4a–10a).

At the hearing before the House Judiciary Committee, the City contended, but the Department of the Army denied, that as a result of the construction of the dam the pool elevation of the Allegheny River at Ford City was raised above the pre-dam ordinary high water mark. The committee stated that, because of these conflicting views and the question of damages, it recommended that jurisdiction be conferred on the court to determine the questions presented (Def. App. 20a–22a).

The case was tried before the district court primarily on the issue of the location of the pre-dam ordinary high water mark. The district court found that the pre-dam ordinary high water mark at Ford City was 766.8 feet m.s.l. (Pet. App. 25). The district court relied exclusively on the testimony of plaintiff's witness, Shannon. Defendant moved to strike Shannon's testimony on the ground that he relied on improper elements in determining his estimate of the location of the ordinary high water mark (Def. App. 105a). The court of appeals reversed the district court's ruling on the ground that Shannon's testimony should have been disregarded because it was predicated on a legally erroneous premise (Pet. App. 43). The court of appeals also determined that this case did not come within the rule of *United States v. Kansas City Ins. Co.*, 339 U.S. 799.

ARGUMENT

The decision of the court of appeals is correct, and in accord with the decisions of this Court. There is

no conflict between circuits. Accordingly, there is no occasion for further review.

1. The primary question to be determined in this case was the location of the pre-dam ordinary high water mark. Plaintiff's witnesses predicated their testimony on the erroneous premise that the line where vegetation ceases to exist is the sole determinant of the ordinary high water mark. The court of appeals, in reversing the district court, correctly ruled (Pet. App. 43):

> This is not a question of credibility of witnesses or weight of evidence. It is simply that Shannon's opinion evidence of situs of the post-dam ordinary high-water mark was totally predicated on a legally wrong premise. The test for ascertaining that mark passed along to him for his use was erroneous. The trial judge, forming his conception of the mark from the same source, accepted Shannon's findings and rested his decision completely on those findings. In this resultant situation reversal of the judgment and remand of the matter to the district court for the entry of judgment in favor of the defendant-appellee is indicated.

This, we submit, completely answers petitioner's claim that the court of appeals improperly invaded the trial court's province by passing on the weight of the evidence (Pet. 13–14). The factors looked to by the court of appeals in determining the ordinary high water mark are those that have been approved by the courts generally. They included the vegetation line, the line the eye traces in going either up or down a river, the litter line, the shelving action of the river,

etc. (Pet. App. 34–42). This eclectic test is in accord with, rather than contrary to, the one case with which petitioner claims there is a conflict (Pet. 14).

2. Since the court of appeals correctly found that the post-dam ordinary high water mark was *not* higher than the pre-dam ordinary high water mark, the principle that the federal government may raise the level of a navigable river and maintain it at the ordinary high water mark without being responsible for consequential damages is applicable. *United States* v. *Kansas City Ins. Co.*, 339 U.S. 799, 805; *United States* v. *Willow River Co.*, 324 U.S. 499, 510; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 596–597; *Gibson* v. *United States*, 166 U.S. 269. The only items of damage here were consequential. The United States did not take petitioner's sewers; the City has used and continues to use its sewer system. To be sure, it has been subjected to increased cost of maintenance and has had to rebuild some of its lines, but these are items of consequential damage, and not a taking under the Fifth Amendment. As stated in *United States* v. *Chicago, M., St. P. & P. R. Co.*, *supra*, at page 597:

> The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

United States v. *Kansas City Ins. Co.*, *supra*, on which petitioner relies, does not control this situation. In that case this Court held that the United States must compensate for damage to agricultural land

located on a nonnavigable tributary one and one-half miles upstream from the navigable river, where the damage was caused by a dam which maintained the navigable river continuously at the ordinary high water mark. The Court's theory was that the navigation servitude of the United States does not extend beyond the bed of the navigable river (339 U.S. at 806). But petitioner here is not located beyond the bed of a navigable stream. Petitioner, rather, is a city that is bounded by the navigable Allegheny (Pet. 4), and has dumped its sewage directly into that navigable stream since 1898. As the court of appeals pointed out (Pet. App. 48), "what we have in this appeal is fairly and plainly a sewer system that is a riparian location unit. It is an operation conceived to take advantage of the use of the flow of a navigable stream. It is utterly dependent on the Allegheny. It owes its existence and entire function to that navigable river. * * * [And] there is not one word of testimony that any Ford City fast land whatsoever was harmed in the slightest."

The standard applied by the court of appeals, which conforms to that of the other circuits and the Court of Claims (see *City of Eufaula, Alabama* v. *United States*, 313 F. 2d 745 (C.A. 5); *City of Demopolis, Alabama* v. *United States*, 334 F. 2d 657 (C. Cls.)), follows from this Court's decision in *United States* v. *Virginia Electric Co.*, 365 U.S. 624, where the Court made clear that there is no duty to compensate for damage to uses of the land which have value only "in connection with the flow of the stream" (p. 630)—

such as "value, derived from the location of the land, [which] is attributable in the end to the flow of the stream" (p. 629). Here, the only values impaired by the government's building a dam which raised the river's level within the ordinary high water mark derived from the fact that petitioner's sewage system was designed to take advantage of the flow of the navigable river.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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